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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

ARTHUR ROSENBLATT,

Plaintiff and Respondent,

v.

JONATHAN DAVIS,

Defendant and Appellant.

B203915

(Los Angeles County  
Super. Ct. No. BC361340)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

McPherson & Associates, Edwin F. McPherson and Tracy B. Rane for Defendant and Appellant.

Abronsen Law Office and Louis S. Abronsen for Plaintiff and Respondent.

Defendant and appellant Jonathan Davis (defendant) appeals from the trial court's order denying his special motion to strike, pursuant to Code of Civil Procedure section 425.16<sup>1</sup> (anti-SLAPP motion), a complaint filed by plaintiff and respondent Arthur Rosenblatt (plaintiff). We affirm the trial court's order denying the anti-SLAPP motion.

## **BACKGROUND**

### **1. The Underlying Lawsuit and the Settlement Agreement**

On December 29, 2004, plaintiff sued defendant for breach of an oral agreement to open and operate a museum that would display certain artifacts and works of art created or owned by serial killers (the underlying lawsuit). Plaintiff, a curator of historical exhibits, was to provide the site for the museum and the artwork to be displayed, and defendant was to provide financing for the museum. Defendant, the lead singer of a well-known rock band, was also a collector of serial killer art and artifacts. Defendant had also participated in the creation of a company called End Gallery LLP that was dedicated to the collection and display of such art.

The parties eventually settled the underlying lawsuit. Under the terms of the settlement, defendant agreed to give plaintiff the following property: a Volkswagen vehicle previously owned by Ted Bundy; two clown suits previously owned by John Wayne Gacey; four paintings by John Wayne Gacey; a confession signed by Albert Fish; and five drawings by Richard Ramirez (collectively, the released property). As part of the settlement, defendant agreed to refrain from saying anything negative about the released property and from publicly disparaging plaintiff or the released property.

The parties memorialized the terms of their settlement in a written agreement that included the following provision: "Davis agrees that he shall not publicly disparage or otherwise say anything negative about the Released Property." Plaintiff claims he signed the settlement agreement on December 2, 2005, and delivered the signed agreement to defendant on that same date in exchange for delivery of the Bundy vehicle. Defendant

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

delivered possession of the Bundy vehicle to plaintiff on December 2, 2005, and delivered the remainder of the released property on January 3, 2006. Defendant signed the settlement agreement on January 5, 2006.

## **2. OSC Regarding Enforcement of the Settlement Agreement**

In January 2006, a dispute arose between the parties concerning enforcement of the settlement agreement. Plaintiff refused to file a request for dismissal of the underlying lawsuit because he claimed that defendant had breached the settlement agreement by publicly disparaging the released property in mid-December 2005. The dispute became the subject of an order to show cause to enforce the terms of the settlement agreement.

At the March 22, 2006 hearing on the order to show cause before Judge Irving Feffer, counsel for plaintiff argued that a valid, enforceable settlement agreement existed as of December 2, 2005, because plaintiff signed the agreement on that date and provided the signed settlement agreement to defendant in exchange for the Bundy vehicle. Defendant's counsel did not dispute that plaintiff signed the settlement agreement on December 2, 2005, and that delivery of the Bundy vehicle occurred on that date, but claimed that it was improper for plaintiff to seek a factual finding that a binding settlement agreement existed as of December 2, 2005. Defendant argued that the court's factual finding should be limited to performance of the parties' settlement agreement, and that the court should enter a dismissal of the underlying lawsuit on that basis. In response, plaintiff's counsel argued that a determination concerning the effective date of the settlement agreement was necessary in order to preserve plaintiff's right to file a subsequent lawsuit against defendant for breach of the settlement agreement.

At the conclusion of the hearing, Judge Feffer found that the underlying lawsuit had settled on December 2, 2005, "when the signature of the plaintiff was put on pen and paper and agents for the defendant commenced doing those things contemplated by the settlement agreement, namely removal of the infamous Volkswagen Bug of Mr. Bundy that was taken as a result of the authorization on the part of the defendants."

### **3. The Instant Lawsuit**

Plaintiff filed this action for breach of contract and fraud on November 3, 2006, alleging that defendant breached the terms of the settlement agreement by publicly disparaging the released property in interviews published on December 13, 14, 15, and 16, 2005, and that defendant's public statements caused significant diminution in the value of that property. Plaintiff further alleged that defendant entered into the settlement agreement with no intention of performing his promise not to disparage the released property.

The allegedly disparaging remarks made by defendant appeared in several articles published on the internet and captioned as follows: "Korn Star Gives Up His Serial Killer Collection," published on contactmusic.com on December 13, 2005; "Korn's Jonathan Davis Gives Up His Serial Killer Collection," published on starpulse.com on December 14, 2005; "Korn Star Gives Up His Serial Killer Collection," published on yahoo.com on December 15, 2005; "Jonathan Davis Ending Serial Killers Collectibles Hobby," published on rockdirt.com on December 16, 2005; and "The Week in Weird: Korn's singer tosses murder memorabilia," published on rollingstone.com on December 16, 2005. Each of these articles contained all or some of the following statements attributed to defendant: "I'm done with that. I got all that stuff out. I just got over it. I was really into it for a while. I still have the car (Bundy's vehicle) but I'm just bringing negativity and negative sh\*\*t in my house with it, and I don't want that around my kids." "What about those 70 girls' parents -- their babies got killed in that car, and I wanna display it! That is f\*\*ked up." "There is definitely a vibe and weird sh\*\*t attached to those things. I really don't want to glorify these people and what they did and display the sh\*\*t. I wasn't thinking straight when I bought that stuff. I was sucked into it because it was so dark and I'm like, 'This is cool.'"

### **4. The Anti-SLAPP Motion**

Defendant filed a special motion to strike the complaint, on the grounds that the causes of action asserted against him were based on activity protected under section 425.16, and that plaintiff could not show a probability of prevailing on the merits.

Defendant argued that no breach of the settlement agreement had occurred because the statements attributed to him were made, if at all, before the effective date of the settlement agreement. Defendant further argued that the published statements did not disparage any of the released property because the statements did not specifically identify any of the released property. In support of his motion, defendant submitted his own declaration in which he stated that because he is interviewed hundreds of times during any given year, he did not specifically recall making the statements at issue. Defendant further stated that because the published statements indicated that he still possessed the Bundy Volkswagen at the time, he was certain that, if he had made the statements, he did so before December 2, 2005 -- the date on which he transferred possession of the Volkswagen vehicle to plaintiff. Defendant conceded, for purposes of the anti-SLAPP motion, that December 2, 2005, was the effective date of the settlement agreement.

In his opposition to defendant's anti-SLAPP motion, plaintiff agreed that the causes of action asserted in the complaint were based on activity protected under section 425.16.<sup>2</sup> Plaintiff argued, however, that his causes of action for breach of contract and fraud were legally sufficient and supported by a prima facie showing of facts sufficient to sustain a favorable judgment. In support of his opposition, plaintiff submitted his own declaration, in which he stated that for purposes of settling the underlying lawsuit, he estimated the value of the released property to be approximately \$100,000, and that defendant's statements resulted in substantial diminution in the value of the released property. Plaintiff explained that defendant's statements that he still owned the Bundy

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<sup>2</sup> The trial court granted plaintiff's motion, pursuant to California Rules of Court, rule 2.550 (formerly rule 243.1), to file under seal plaintiff's response to the anti-SLAPP motion and certain other documents that either contained or discussed in detail the terms of the settlement agreement. Those documents were filed under seal in this court pursuant to California Rules of Court, rule 8.160. We sent notice to the parties, under rule 8.160(f), of our intent to order unsealed the portions of the sealed documents that are either contained in or discussed in detail in this opinion. Neither party objected to unsealing portions of the record. On our own motion, we order those portions of the sealed document unsealed. (Cal. Rules of Court, rule 8.160(f).)

vehicle, published after defendant had transferred possession of the vehicle to plaintiff, raised questions concerning its authenticity, and resulted in plaintiff's inability to sell the vehicle. Plaintiff also submitted the declarations of two experts, Arthur Weinstein and Joe Franklin, who attested to the negative effect of defendant's statements on plaintiff's ability to generate revenues by publicly displaying the released property, and on publishing practices in the entertainment journalism industry.

In his declaration, Franklin opined, based on his experience as a celebrity interviewer, that he was not familiar with the practice of delaying the publication of a celebrity interview for any period of time. Franklin further opined that delaying the publication of a celebrity interview for as much as a week would make very little sense, particularly in a marketplace where news outlets are constantly in direct competition for stories about celebrities.

Weinstein's declaration was based on his experience as an event producer and as the owner of large-scale entertainment venues in New York City. He also reviewed videotape and articles published before December 2005 about defendant's previous interest in serial killer art and artifacts, and defendant's association with previous public displays of such art and artifacts. Weinstein estimated defendant's domestic fan base at approximately two million people, based on album sales for defendant's rock band. Weinstein opined that some percentage of this fan base might reasonably be expected to patronize a museum displaying serial killer art and artifacts because defendant had previously promoted his collection of such art and artifacts in a generally positive light. Weinstein further opined that defendant's December 2005 statements, in which defendant publicly disassociated himself from these objects would cause defendant's fan base to lose interest in viewing these objects and would negatively impact plaintiff's ability to earn revenues from that demographic segment.

In response to plaintiff's opposition, defendant submitted the declaration of Angelica Cob-Baehler, the Senior Vice-President of publicity for Capitol Music Group, disputing Franklin's opinions concerning the publication of celebrity interviews. Defendant also filed evidentiary objections to all three of the declarations submitted by

plaintiff. Defendant did not file evidentiary objections to the statements about serial killer art and the Bundy vehicle attributed to him in the internet articles.

After hearing argument from the parties, the trial court denied defendant's anti-SLAPP motion, concluding that plaintiff had met his burden of demonstrating a probability of prevailing on his breach of contract and fraud claims. The minute order from the October 18, 2007 hearing on the anti-SLAPP motion states that the trial court overruled all but one of defendant's objections to the Franklin declaration, and that the court overruled "most" of the objections to plaintiff's declaration and the Weinstein declaration, "as reflected in the court's rulings on the written objections." This appeal followed.

## **DISCUSSION**

### **I. Applicable Law and Standard of Review**

Section 425.16 provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Determining whether the statute bars a given cause of action requires a two-step analysis. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action "aris[es] from any act . . . in furtherance of the [moving party's] right of petition or free speech." (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.)

If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a "probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 "must demonstrate that the complaint is both legally sufficient or supported by a sufficient prima facie showing of facts to sustain a favorable

judgment if the evidence submitted by the plaintiff is credited.” [Citation.]” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 746, fn. omitted.) “In opposing an anti-SLAPP motion, the plaintiff cannot rely on allegations in the complaint, but must bring forth evidence that would be admissible at trial. [Citation.]” (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576 (*Ampex*)). A court reviewing such evidence does not weigh credibility or evaluate the weight of the evidence, but “accept[s] as true the evidence favorable to the plaintiff and assess[es] the defendant’s evidence only to determine if it has defeated plaintiff’s submission as a matter of law.” (*Ibid.*)

We review de novo a trial court’s order granting or denying a special motion to strike under section 425.16. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) We review the trial court’s evidentiary rulings under the abuse of discretion standard. (*Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444.)

## **II. Probability of Prevailing**

The parties agree that defendant made the requisite threshold showing that plaintiff’s causes of action arose from protected activity and that the burden shifted to plaintiff to demonstrate a probability of prevailing. As we discuss, plaintiff met that burden.

### ***A. Breach of Contract Cause of Action***

A cause of action for breach of contract requires proof of the following elements: (1) the existence of a contract; (2) plaintiff’s performance or excuse for nonperformance; (3) occurrence of all conditions required for defendant’s performance; (4) defendant’s breach; and (5) resulting harm to plaintiff. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239; CACI No. 303.) Defendant does not dispute the existence of a binding, enforceable settlement agreement pursuant to which he agreed to refrain from publicly disparaging or saying anything negative about the released property.<sup>3</sup> Defendant

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<sup>3</sup> In this appeal, defendant argues that the settlement agreement did not become binding and enforceable before January 5, 2006, the date on which he signed the

maintains, however, that plaintiff failed to establish a prima facie case with respect to the remaining elements of a breach of contract claim.

### **1. Plaintiff's performance or excuse for nonperformance**

Defendant contends that plaintiff failed to establish performance of his own obligation under the settlement agreement to dismiss the underlying lawsuit promptly after receiving the released property. Plaintiff presented evidence, however, that his initial nonperformance of this obligation was excused by defendant's alleged breach, in mid-December 2005, of his promise not to disparage the released property. Moreover, the record shows that the underlying lawsuit was subsequently "dismissed with prejudice pursuant to the request of plaintiff[s] counsel" at the March 22, 2006 hearing before Judge Feffer.<sup>4</sup> Plaintiff's evidentiary showing was sufficient with respect to this element of his breach of contract claim.

### **2. Conditions for defendant's performance**

Defendant claims that plaintiff failed to establish that all conditions for defendant's performance had occurred as of December 13, 14, 15, and 16, 2005 -- the dates on which the allegedly disparaging statements were published. Defendant argues that as of mid-December 2005, at least two conditions had not yet occurred -- he had not

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agreement. At the October 18, 2007 hearing on the anti-SLAPP motion, however, defendant's counsel conceded, for purposes of the anti-SLAPP motion, that the effective date of the settlement agreement was December 2, 2005, and defendant is arguably estopped from taking a different position on appeal. (See *California Coastal Comm. v. Tahmassebi* (1998) 69 Cal.App.4<sup>th</sup> 255, 259-260 [a party is barred from taking position on appeal inconsistent with one argued in the trial court].) In any event, as we discuss, plaintiff presented sufficient evidence that the settlement agreement became effective on December 2, 2005.

<sup>4</sup> As evidence that the underlying lawsuit was never dismissed, defendant cites the civil case summary from the Los Angeles Superior Court's website indicating that this case was "Consolidated for all Proceedings" with Los Angeles Superior Court case No. BC317414 (the case number of the underlying lawsuit) on March 22, 2007. In addition, the trial court's October 18, 2007 minute order denying the anti-SLAPP motion lists the case number as BC317414 and indicates that the case has been "reactivated and [consolidated with case number] BC361340.

yet signed the settlement agreement, and he still had to deliver an additional five items of artwork. Defendant presented evidence that he did not sign the settlement agreement or deliver the balance of the released property until January 5, 2006.

The date on which the parties became bound by the settlement agreement is a disputed fact. Plaintiff presented evidence that the settlement agreement became binding on December 2, 2005, the date on which he signed the agreement and on which defendant commenced performing his obligation to deliver the released property by transferring possession of the Bundy vehicle to plaintiff. Plaintiff also cites the relevant provisions of the settlement agreement, which impose on defendant an unconditional obligation to refrain from publicly disparaging the released property. Defendant presented a copy of a signature page to the settlement agreement indicating that plaintiff did not sign the settlement agreement until December 10, 2005. Defendant also presented evidence that he did not sign the settlement agreement or deliver the balance of the released property, until January 3, 2006.

Defendant cites *Levy v. Superior Court* (1995) 10 Cal.4th 578 (*Levy*) as support for his argument that the settlement agreement was not binding on him before January 5, 2006 -- the date he signed the agreement. *Levy* concerned a motion to enforce a settlement agreement pursuant to section 664.6, which governs entry of judgment pursuant to the terms of a stipulation for settlement.<sup>5</sup> The settlement agreement at issue in *Levy* was not signed by the party against whom the plaintiff sought to enforce the agreement, but only by that party's attorney. The court in *Levy* concluded that the settlement agreement was not enforceable against the nonsignatory party, reasoning that a litigant's direct participation in the settlement was a prerequisite to the "summary, expedited procedure" to enforce a settlement agreement under section 664.6. (*Levy*, at pp. 585-586.) The instant case does not involve summary enforcement of a settlement

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<sup>5</sup> Section 664.6 provides in relevant part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

agreement pursuant to section 664.6, and it is undisputed that the agreement was signed by defendant. *Levy* is therefore inapposite.

Plaintiff presented sufficient evidence to support a prima facie showing that the conditions required for defendant's performance had occurred. Although defendant presented conflicting evidence to the contrary, a court reviewing an anti-SLAPP motion does not evaluate the credibility or weight of the evidence, but accepts as true the evidence favorable to the plaintiff. (*Ampex, supra*, 28 Cal.App.4th at p. 1576.) That defendant did not sign the settlement agreement or fully perform his obligations thereunder until January 5, 2006, does not mean the agreement was not binding upon him before that date as a matter of law. Rather, in view of the conflicting evidence, the effective date of the parties' settlement agreement is a question of fact to be determined by the trier of fact. (See *Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407.)

### **3. Defendant's breach**

As evidence of defendant's breach, plaintiff presented five internet articles published on December 13, 14, 15, and 16, 2005, quoting defendant as saying, among other things, that he was "done" with collecting serial killer art; that he did not "want to glorify these people and what they did and display the sh\*\*t." Defendant was also quoted as saying that although he still possessed the Bundy vehicle, "I'm just bringing negativity and negative sh\*\*t in my house with it, and I don't want that around my kids." "When I started to think about it, I was like, 'What about those 70 girls' parents -- their babies got killed in that car, and I wanna display it! That is f\*\*cked up." In addition, plaintiff submitted the declaration of Joe Franklin as an expert on the subject of broadcasting and publishing practices in the entertainment journalism industry. Franklin opined that it was not a common practice to delay the publication of a celebrity interview for any period of time, particularly if that interview was news-breaking or contained a hint of gossip or scandal.

Defendant contends the Franklin declaration should have been excluded as improper opinion evidence. Defendant further contends the internet articles are

insufficient to support plaintiff's breach of contract claim because there is no evidence as to when defendant made the statements attributed to him in the articles.<sup>6</sup> He claims that because the articles quote him as saying he still possessed the Bundy vehicle, the statements must have been made, if at all, before December 2, 2005. Finally, defendant argues that because the statements themselves do not identify any specific serial killer art or artifacts except the Bundy vehicle, they do not establish that he disparaged any of the specific property covered by the settlement agreement. As we discuss, the trial court did not abuse its discretion by considering the Franklin declaration, and plaintiff's evidence was sufficient to support a prima claim that defendant breached the settlement agreement.

***a. Franklin declaration***

The trial court sustained one of defendant's objections to the Franklin declaration, ruling as inadmissible Franklin's opinion that it was "extraordinarily unlikely" that the statements attributed to defendant in the internet articles published on December 13, 14, 15, and 16, 2005, were made on or before December 2, 2005. The trial court ruled that the balance of the Franklin declaration was admissible.

"Generally, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. . . .' [Citations.] Also, '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citation.] However, "'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.'" [Citation.]' [Citations.]" (*PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 63 (*PM Group*)).

The record reveals that Franklin's declaration related primarily to certain customs and practices in the entertainment publishing industry, specifically, the publishing of

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<sup>6</sup> There was some discussion during oral argument as to whether the internet articles constitute hearsay evidence. Defendant did not raise this issue, however, either in the trial court or in his appellate briefs. Accordingly, we do not address that issue.

celebrity interviews. Because these customs and practices are sufficiently beyond common experience, Franklin's expert opinion was admissible. (*PM Group, supra*, 154 Cal.App.4th at p. 63; 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 73, p. 619 ["expert evidence is admissible on the existence of a particular custom, usage, or mercantile practice"].) The trial court did not abuse its discretion by overruling defendant's objections to the Franklin declaration.

#### ***b. Evidence of breach***

The statements attributed to defendant in the internet articles published between December 13 and 16, 2005, and Franklin's testimony concerning the timing for publication of celebrity interviews, are sufficient to support a prima facie claim for breach of the settlement agreement. This evidence, if credited by the trier of fact, would establish that defendant made certain statements during the days preceding December 13, 2005, referring to the Bundy vehicle as "bringing negativity and negative sh\*\*t" into his home, and displaying the vehicle as "f\*\*ked up."

#### **4. Resulting harm to plaintiff**

Plaintiff presented his own declaration and the declaration of Arthur Weinstein to establish the extent of harm plaintiff suffered as a result of defendant's alleged breach. Defendant objected to the Weinstein declaration as improper opinion evidence, lacking foundation and speculative. Defendant objected to plaintiff's declaration on various grounds, including that it contained inadmissible hearsay.

The trial court's minute order dated October 18, 2007, states that the court ruled on defendant's evidentiary objections to the declarations of Weinstein and Rosenblatt, "as reflected in the court's rulings on the written objections." The record on appeal did not include the trial court's rulings on the written objections to the Weinstein and Rosenblatt declarations. On December 9, 2008, we sent a letter asking defendant's counsel to submit a copy of the trial court's rulings on defendant's written objections to the Weinstein and Rosenblatt declarations. Defendant's counsel responded in a letter dated December 16, 2008, stating that defendant had never received a copy of the trial court's evidentiary rulings and that counsel's efforts to obtain a copy of the written rulings had

been unsuccessful. We requested and obtained the superior court file containing the trial court's evidentiary rulings and we augment the record on our own motion to include those evidentiary rulings. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

The trial court's written rulings indicate that the court overruled all of defendant's objections to the Weinstein declaration and most of the objections to the Rosenblatt declaration. Defendant contends the trial court's evidentiary rulings were an abuse of discretion because the Weinstein declaration was not proper expert testimony and because the Rosenblatt declaration contains inadmissible hearsay. Defendant further contends the admissible evidence is insufficient to establish that plaintiff suffered any harm as a result of defendant's published statements. As we discuss, the trial court's evidentiary rulings were not an abuse of discretion, and the evidence is sufficient to support a prima facie showing that plaintiff was harmed as the result of defendant's alleged breach.

***a. Weinstein declaration***

Weinstein's declaration, based on his experience as an event producer, related to the impact of defendant's statements concerning the Bundy vehicle and other serial killer art on plaintiff's ability to earn revenues from the public display of the released property. Weinstein's declaration concerned the customs and practices in promoting and producing such events, and was admissible for this purpose. (*PM Group, supra*, 154 Cal.App.4th at p. 63; 1 Witkin, Cal. Evidence, *supra*, Opinion Evidence, § 73, p. 619.)

***b. Plaintiff's declaration***

Plaintiff's declaration described, among other things, his unsuccessful efforts to sell certain of the released property after defendant's statements were published on the internet. Defendant contends the trial court erred by overruling hearsay objections to the following portions of plaintiff's declaration:

1. "The Defendant did disrupt and/or damage my revenues, and continues to do so via the calculating statements he made in December 2005. In addition to the damages explained in the expert declaration of Arthur Weinstein, a few clear, specific examples of losses I have suffered follows: . . . The Defendant's statements, published in

the International news media, have harmed my many attempts to sell additional property which was surrendered to me by the Defendant. Since December 2005, I have attempted to liquidate the various Oil Paintings which were surrendered to me by the Defendant. In that time, I have succeeded in selling only one of these paintings, and at only approximately 50% of the price that the Defendant originally paid for it in 2003.”

2. “Prior to the Defendant’s negative statements in the press, I would have had very little difficulty liquidating these paintings. When the paintings were originally purchased by the Defendant in 2002-03, the prices ranged between \$2,500 to \$4,500 each. As of this moment, the most expensive of these paintings is priced at \$1,500 and has not sold. In this case, the statements made by the Defendant have only ‘turned off’ the already very small community of individuals who would be interested in purchasing this type of oil painting.”

3. “Formerly one of my best outlets for retail sales with purchases in excess of \$35,000, Adam has transacted virtually no business with me since this incident and very infrequently communicates with me anymore.”

4. “Ciaglia then reneged on the deal and offered the explanation that he did not believe the item to be authentic apparently because Ciaglia wasn’t persuaded that I owned the actual 1968 Volkswagen in question. The Defendant’s interview in the press stated that he, not I, owned the VW and the client believed what he read. A dispute ensued, and Tony Ciaglia has refused to transact further business with me or any representatives because he now believes that I offered to sell him fraudulent artifacts, which is completely untrue.”

The foregoing portions of plaintiff’s declaration do not constitute hearsay. “‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) “The word ‘statement’ as used in the definition of ‘hearsay evidence’ is defined in Evidence Code section 225 as ‘oral or written verbal expression’ or ‘nonverbal conduct . . . intended . . . as a substitute for oral or written verbal expression.’ Hence, evidence of a person’s conduct out of court is not

inadmissible under the hearsay rule expressed in [Evidence Code] Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.” (Cal. Law Revision Com. com., Deering’s Ann. Evid. Code (2009 ed.) foll. § 1200.) None of the objected to portions of plaintiff’s declaration contain a “statement” offered to prove the truth of the matter stated. The trial court did not abuse its discretion by overruling defendant’s hearsay objections to the portions of plaintiff’s declaration describing his failed attempts to sell the released property.

***c. Evidence of harm***

Plaintiff’s declaration and the Weinstein declaration constitute sufficient evidence to support a prima facie showing that plaintiff was harmed as a result of defendant’s alleged breach of the settlement agreement.

***B. Fraud Cause of Action***

To establish a prima facie claim for fraud by false promise, a plaintiff must prove that the defendant made a promise he had no intention of performing; that this promise was important to the transaction; that the plaintiff reasonably relied on the promise; that the defendant did not perform the promise; that the plaintiff was harmed; and that the plaintiff’s reliance on the defendant’s promise was a substantial factor in causing the harm. (CACI No. 1902.)

Plaintiff presented evidence that defendant agreed to refrain from making disparaging statements about the released property; that defendant’s agreement to do so was an important part of the settlement; that defendant made negative statements about the Bundy vehicle and other serial killer art that were published between December 13 and 16, 2005; and that plaintiff was unable to sell the Bundy vehicle and other items of the released property after defendant’s statements were published. This evidence was sufficient to support a prima facie claim for fraud by false promise.

**III. Conclusion**

Plaintiff met his burden of demonstrating a probability of prevailing on his breach of contract and fraud causes of action. Defendant’s anti-SLAPP motion was properly denied.

## **DISPOSITION**

The order denying defendant's anti-SLAPP motion is affirmed. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
ASHMANN-GERST